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In The  
**Supreme Court of the United States**  
October Term, 1989

JACK McCORMICK,  
Warden of the Montana State Prison, and  
MARC RACICOT,  
Attorney General of the State of Montana,

*Petitioners,*

v.

DEWEY E. COLEMAN,

*Respondent.*

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITIONERS  
THE STATE OF IDAHO JOINED BY:  
ALABAMA, ARIZONA, CALIFORNIA,  
CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,  
INDIANA, KANSAS, MISSISSIPPI, MISSOURI,  
NEBRASKA, NEVADA, NEW MEXICO, NORTH  
CAROLINA, PENNSYLVANIA, SOUTH CAROLINA,  
SOUTH DAKOTA, UTAH AND WYOMING

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause bar the retroactive application of a constitutional capital sentencing scheme upon resentencing of a criminal defendant whose trial occurred when a mandatory death penalty was in effect, even though such retroactive application is permitted by the *Ex Post Facto* clause?

2. May a novel due process theory be applied on collateral review to overturn a death sentence which was final in 1979?

3. Does harmless error analysis apply to a due process violation arising from the retroactive application of capital sentencing procedures; and if the error may not be deemed harmless, what is the appropriate remedy?

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## INTERESTS OF AMICI<sup>1</sup>

Courts of the amici states follow rules of law in capital and other cases that are directly or potentially affected by the decision of the Court of Appeals for the Ninth Circuit in *Coleman v. McCormick*, 874 F.2d 434 (9th Cir. 1989). The decision alters precedent on which the amici states have relied.

The unjustified expansion of due process protections accomplished by the Court of Appeals' decision far exceeds the scope of this Court's cases and threatens to create a substantial obstacle to law enforcement in any state where this theory of due process of law is followed.

The lower court's holding that harmless error analysis cannot be applied to the kind of due process violation it has defined is inconsistent with this Court's cases and creates for amici another obstacle to the finality of state court judgments not justified by federal constitutional law.

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## SUMMARY OF ARGUMENT

1. A defendant on trial for murder is not deprived of the quality of notice required by the Due Process Clause when a state later makes a change in its death sentencing law that provides the defendant a previously

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<sup>1</sup> The State of Hawaii, by its Attorney General, joins the arguments presented by this brief because of the importance of the issues to the administration of the criminal law and the habeas corpus statute. Hawaii does not have a death penalty statute and takes no position on issues related to death sentencing.



nonexistent opportunity to have mitigating evidence considered. This Court's precedent affords no basis for a conclusion that the Due Process Clause is violated by a retroactive sentencing procedure that complies with the Ex Post Facto Clause. The Court of Appeals' decision conflicts with this Court's precedent and with the decisions of other appellate courts.

2. The federal and state interest in the finality of judgments favors a rule whereby novel theories of constitutional right may not be considered for the first time on federal collateral review.

3. The Court of Appeals' view of *per se* constitutional error arising out of its novel due process definition is not consistent with this Court's applicable precedent. The opinion below refuses to apply harmless error rules to occurrences that *benefited* defendant and which had no serious potential for affecting the outcome of the case to his disadvantage.

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## REASONS FOR GRANTING THE WRIT

### I

#### The Decision Of The Ninth Circuit Court Of Appeals Conflicts With This Court's Precedent Applying The Due Process And Ex Post Facto Clauses

The Court of Appeals held that Coleman was deprived of due process of law because he did not know at the time of trial that Montana would later ameliorate the rigor of its mandatory death penalty by giving the sentencing court the discretion to consider mitigating factors. As the Court of Appeals saw it, Coleman should

have been given notice "of the life and death consequences of his actions in defending himself against the state's prosecution before and during trial." App. 18.

To the Court of Appeals, fairness required that Coleman's counsel know at the time of trial that the death penalty would not be mandatory. Without such knowledge, Coleman's counsel was thought to be in no position to make informed choices about what evidence should be offered, whether Coleman should testify, and whether the trial judge should have been disqualified without cause. For example, counsel might have avoided evidence of Coleman's prior criminal activity had he known that such evidence could be used to negate mitigation; Coleman might not have testified and thus exposed his demeanor on the stand had he known that his testimony would be considered at the time of sentencing. "Apparently," the court observed, "Coleman's trial counsel believed that it was necessary for Coleman to testify in order to avoid a conviction. But would he have made this same choice if he had known Coleman's testimony . . . would be considered at a post-conviction sentencing hearing on the question whether Coleman lived or died?" App. 16.

In sum, it was not enough that counsel's choices be informed by adequate preparation and knowledge of the law. Counsel needed also to be aware of unanticipated future changes in sentencing law that would operate to his client's benefit.

The theory that Coleman might have wanted to testify at trial to avoid a conviction but might not have wanted to testify at a sentencing proceeding is not a plausible reason for setting aside Coleman's conviction.

Evidently, the Court of Appeals thought there was some chance that Coleman might have preferred a conviction to an acquittal as long as he received a sentence less than death. In such case Coleman would have chosen to forego giving the exculpatory testimony he considered necessary for an acquittal in order to prevent the sentencing court from observing his demeanor and learning of his past crimes. As well as being unrealistic, this is somewhat circular reasoning. If Coleman's trial testimony were viewed as exculpatory, that is, necessary for an acquittal, counsel would likely also have thought it to be mitigating.

The Due Process Clause protects such interests as those identified by the Court of Appeals only if it protects a "sporting theory of justice" in which the game is its own end and the legitimacy of the outcome is of only passing interest, if it is of any interest at all. This Court, however, has rejected the notion that the Due Process Clause protects mere trial stratagems which depend upon withholding facts from the trier of fact or upon requiring the State to furnish the defendant with a basis for predicting all of the factors that might affect the trier's decision. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

Due process of law upholds interests more fundamental than strategic options. The Due Process Clause has, historically, been applied to deliberate decisions of government agents to deprive one of life, liberty or property. Its protections were intended to secure the individual from the arbitrary exercise of the powers of the government. *Daniels v. Williams*, 474 U.S. 327 (1986). The clause promotes fairness in decisions to deprive one of life, liberty or property by requiring that appropriate

procedures be followed. *Id.* The Court has said that the Due Process Clause protects the individual against two types of government action:

So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165 or interferes with rights implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319.

When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Matthews v. Eldridge*, 424 U.S. 319. This requirement has traditionally been referred to as procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

It has also been held that the Due Process Clause is violated when government action offends some principle of justice so deeply rooted in our legal traditions as to be considered fundamental. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). That process which is due is that which has received judicial acceptance as an important element of fair proceedings.

It is at once apparent that the Montana procedure followed in Coleman's case does not offend any historically accepted principle of justice. Expressly to the contrary, retroactive application of ameliorative death sentencing standards was approved by the Court in *Dobbert v. Florida*, 432 U.S. 282 (1977), against a claim that the procedure violated the Ex Post Facto Clause of Article I, Section 10. It would be incredible to think that the Court had approved a retroactive statutory application under the Ex Post Facto Clause while at the same time believing that the process it approved shocked the conscience, interfered with rights implicit in the concept of ordered

liberty or offended some principle of justice so deeply rooted in our legal traditions as to be considered fundamental.

Although the Due Process Clause may be broader in the protections it affords, it does not furnish a basis for the development of principles of fairness that are irreconcilable with those defined under the Ex Post Facto Clause. The tenor of the judgment below is that the practice followed in Coleman's case is fundamentally fair for ex post facto purposes and fundamentally unfair for due process purposes, a view that renders the Ex Post Facto Clause superfluous.

The values protected by the Ex Post Facto Clause, in the context of this case, are coextensive with the interests protected by the Due Process Clause.

In *Marks v. United States*, 430 U.S. 188, 191-192 (1977), the Court explained that the Ex Post Facto Clause differs from the Due Process Clause not in the nature of the rights protected, but in the objects of regulation:

The Ex Post Facto Clause is a limitation upon the powers of the legislature [citation omitted] and does not of its own force apply to the Judicial Branch of government. [Citation omitted.] But the principle on which the clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. [Citation omitted.] As such, *that right is protected against judicial action by the Due Process Clause of the fifth Amendment . . .* " (emphasis added)

It is implicit in *Marks* that questions of notice that would be resolved *in favor* of the state under the Ex Post



Facto Clause cannot properly be resolved *against* the state under the Due Process Clause.

In *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), the Tenth Circuit Court of Appeals held, contrary to the Ninth Circuit view, that resentencing in a capital case, following a constitutionally required restructuring of state law, did not violate either the Ex Post Facto Clause or the Due Process Clause. The court applied *ex post facto* principles to decide the due process issue.

Cf. *Weaver v. Graham*, 450 U.S. 24, 30 (1981) ("critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed").

The absence of tension between the two constitutional clauses is shown by the regulatory objects of each. The Ex Post Facto Clause defines particular prohibited action while the Due Process Clause incorporates these specific inhibitions as part of a more general assurance of fundamental fairness. The Ex Post Facto Clause restrains enactments that retrospectively disadvantage offenders affected by them, *Id.*; the Due Process Clause operates to protect affirmative, enforceable rights, *Id.*, *Snyder v. Massachusetts*, *supra*. Cf. *Spencer v. Texas*, 385 U.S. 554 (1967). (the Due Process Clause "guarantees the fundamental elements of fairness in a criminal trial," but it does not establish the Supreme Court as a rule making organ for rules of criminal procedure 385 U.S. at 563-564). If there is no identified right to notice of an unexpected future change of law, there is nothing for the Due Process Clause

to protect. The Court of Appeals has gotten this backward by its finding that a claim of right that cannot be accepted under the Ex Post Facto Clause stands on its own as a due process right.

In varying contexts, the Court has rejected arguments that the accused has a constitutionally protected interest in being able to predict all of the unforeseen advantages or disadvantages that may be consequences of his strategic choices. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Court held that a defendant assumes the ordinary risk that his attorney may misjudge the consequences of the law or the facts. See also *McMann v. Richardson*, 397 U.S. 759 (1970). In *United States v. Agurs, supra*, the Court found that the defendant was not entitled to disclosure of everything that might affect the case:

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. 427 U.S. at 108-109.

Notwithstanding the thrust of this authority, the Court of Appeals has created a novel due process right to notice of future legal developments that might affect

aspects of trial strategy which are not even concerned with the truth-seeking function of the criminal trial.

The criminal law of most states is inconsistent with the principle espoused by the Court of Appeals.

In *Cartwright v. State*, Ct. Crim. App., Oklahoma, No. H-88-820, July 31, 1989 (Subject to revision or withdrawal until released for publication), the Oklahoma Court of Criminal Appeals, relying on *Coleman v. Saffle*, *supra*, upheld the reimposition of a death sentence after a procedural modification compelled by this Court's decision in *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). The court considered the due process and ex post facto concerns to be the same in the context of the issues raised, a position quite different from that of the Ninth Circuit Court of Appeals in *Coleman*.

A number of state courts have held that aggravating circumstances arising subsequent to conviction could be considered at sentencing in support of findings of statutory aggravation. *Reddix v. State*, 381 So.2d 999 (Miss. 1980); *People v. Malone*, 762 P.2d 1249 (Cal. 1988), *rehearing den.*, January 9, 1989; *Torres-Arbaleido v. State*, 524 So.2d 403 (Fla. 1988); *State v. Terry*, 360 S.E.2d 588 (Ga. 1987); *People v. Albanese*, 473 N.E.2d 1146 (Ill. 1984); *State v. Richmond*, 666 P.2d 57 (Ariz. 1983). *Coleman* conflicts with these decisions. Trial counsel could not have predicated trial strategy on postconviction occurrences and would therefore not have had the quality of notice *Coleman* demands.

A related issue is before this Court in *Clemons v. Mississippi*, No. 88-6873, where the question is whether an appellate court in a state with jury sentencing may



reweigh aggravating and mitigating factors. If it is necessary as a matter of due process that defendant's counsel have notice of future changes in sentencing procedure, it would also seem to be necessary that trial counsel be able to plan his strategy with notice of what aggravating factors will be considered legally valid in future appellate proceedings. If this is so, as *Coleman* implies, a future invalidation of a statutory aggravating circumstance would in all cases undo not only the sentence, but the trial as well.

Other state and federal courts have uniformly construed the Due Process and Ex Post Facto Clauses to be consistent in the nature of the interests protected. *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) (The Due Process Clause protects against judicial action that would violate the Ex Post Facto Clause); *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988) (Ex Post Facto and Due Process Clauses construed consistently). See also: *People v. Easter*, 197 Cal.App.3d 183 (Cal. App. 1987); *People v. Hamilton*, 756 P.2d 1348 (Cal. 1988); *Johnson v. State*, 472 A.2d 1311 (Del. 1983); *Bryant v. State*, 446 N.E.2d 364 (Ind. App. 1983); *Chalin v. State*, 645 S.W.2d 265 (Tex. Ct. App. 1962); *State v. R.H.*, 273 S.E.2d 578 (W. Va. 1980).

Even the Ninth Circuit Court of Appeals has previously held that the Ex Post Facto Clause is a legislative restraint while the accused must look to the Due Process Clause to bar ex post facto applications of law created by judicial action. See *United States v. Walsh*, 770 F.2d 1490 (9th Cir. 1985); *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982). The court's holding that an application valid under the Ex Post Facto Clause can be a violation of due process is not consistent with the view that the Due Process

Clause *extends* the specific protections of the Ex Post Facto Clause to judicial action.

## II

### **New Procedural Rules Should Not Be Permitted To Affect Cases On Collateral Review**

Amici agree with the position of the State of Montana that "application of a constitutional rule not in existence at the time the conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane*, 109 S.Ct. 1060, 1074 (1989).

*Teague v. Lane* was concerned with the defendant's demand, raised in the courts below, that new rules relating to jury selection be applied to him. The Court held that the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), would not be applied retroactively to cases on collateral review.

This case, which is over fourteen years old, furnishes an example of a lack of finality that is altogether too common in capital cases. This Court has recognized the interests of the states in obtaining some measure of finality for death sentencing judgments. See, *Barefoot v. Estelle*, 463 U.S. 880 (1983). Coleman's conviction should not now be subject to a new, novel and patently incorrect legal analysis which has become the basis for another remand.

## III

### **The Harmless Error Analysis Of The Court Of Appeals Is Incorrect**

Coleman was originally sentenced under a mandatory death penalty statute. Following the decision in

*Woodson v. North Carolina*, 428 U.S. 280 (1976), disapproving such statutes, Coleman was given the benefit of a resentencing proceeding at which safeguards announced in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Profitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), were observed. Coleman's sentence is grounded on the modified sentencing procedures. Thus, in contrast with the usual case, Coleman was before the Court of Appeals complaining that he had been placed at a disadvantage by being resentenced according to procedures more beneficial to him than those that had been applicable at his first sentencing proceeding. Even more startling than the fact that the court accepted this analysis is the circumstance that the court found that this "error" could not be harmless. In doing so, the court disregarded the presumption of harmlessness discussed in *Rose v. Clark*, 478 U.S. 570 (1986).

The Court of Appeals considered the ameliorative sentencing proceeding so pervasive an intrusion on Coleman's rights that it required a new trial, a view summed up by the court's observation that "Coleman had no reason to suspect that his decisions at trial would come back to haunt him at the sentencing hearing."<sup>2</sup> App. 18. The problem, in the view of the Court of Appeals, was the "countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that

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<sup>2</sup> One would think that Coleman at least expected that such trial decisions as failed to procure his acquittal might "come back to haunt him at sentencing." The Court of Appeals' decision is tantamount to a holding that there is some kind of due process right to be provided with the tools to avoid the consequences of a valid finding of guilt.

evidence in the record would be considered as either mitigating or aggravating factors." App. 21.

The Court of Appeals' argument is not logically sound and is certainly not required by this Court's precedent. The court's approach to harmless error analysis is grounded on the questionable assumption that there might be some circumstance in which evidence that would help procure an acquittal might prove disadvantageous at sentencing. Thus, "Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge." App. 21. This strained view of the disadvantage inflicted on Coleman by subjecting him to a more beneficial resentencing proceeding ignores the substance of this Court's decisions defining harmless error.

Violations of basic constitutional protections are not harmless if they create a substantial possibility that the error may have affected the outcome of the case. This rule limits remedies for error, as well as stating a concept of reversibility. *Chapman v. California*, 386 U.S. 18 (1967). The reviewing court must assess the entire record and must be satisfied that the error of which complaint is made had more than a slight effect. *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Agurs*, *supra*.

The Court of Appeals' decision follows a wide path around and away from the established limitations on a federal appellate court's right to reverse a state judgment. Instead of merely holding that the defendant is entitled to such notice of the charges against him as would protect

him from being placed twice in jeopardy and would enable him to prepare a defense, the Court of Appeals has created a right to a particular quality of strategic decision at trial. To be sufficient, such decisions must be made with knowledge of uncertain factors that might affect counsel's judgment.

The application of harmless error rules to this formulation is particularly difficult because a reviewing court must attempt to discern the impact on the factfinder of strategic decisions that might have been made if the circumstances had been different. This Court has not required that such strategic judgments be subjected to review according to how they might have been affected by notice of future sentencing benefits. As a general rule, the consequences of counsel's strategic choices are borne only by the defendant and his attorney. *Strickland v. Washington*, 466 U.S. 668 (1984). It is impossible to assess the effect of most strategic decisions made by the defendant's counsel. No one could accurately calculate how a decision not to call witnesses affected the factfinder, or how much more impressed the factfinder might have been with the defendant's case if he had not testified. Yet the Court of Appeals' decision requires that cases turn on such imponderables.

The harmless error rule is intended to avoid reversals for insignificant errors. It is especially important in the relationship between state and federal courts that the federal judiciary scrupulously avoid interfering with state judgments for insufficient reasons. See, *Satterwhite v. Texas*, 486 U.S. \_\_\_\_ (1988) (the harmless error rule "promotes respect for the criminal legal process by focusing on the underlying fairness of the trial rather than on the



virtually inevitable presence of immaterial error"). The Court of Appeals "pervasive error" theory ignores these considerations. It makes the adequacy of notice depend on counsel's being free of the need to assess variables like those every litigant faces and on having almost certain knowledge of the outcome of future appellate decisions.

This Court has "stressed on more than one occasion that the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The rule adopted by the Court of Appeals tells us that if there is any doubt about whether counsel's judgment respecting the production of evidence and the conduct of the trial might have been affected by unforeseen variables, the Due Process Clause requires a new trial. The court could not have come closer to requiring a "perfect" trial, in clear violation of this Court's precedent.

As well as being contrary to this Court's cases, the approach taken by the Ninth Circuit Court of Appeals is inconsistent with the law prevailing in other jurisdictions.

In *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988), the Fifth Circuit Court of Appeals held that the trial court's failure to appoint counsel with more than five years experience, in violation of state law, was harmless error because there was no demonstrable prejudice to the defendant. This conclusion required an assessment of counsel's performance in the circumstances of the case. The argument, rejected in *Sawyer*, that counsel was too inexperienced implies that he was not equipped to make the kind of informed strategic judgments required by

*Coleman*. The Ninth Circuit rationale would probably have led to reversal in *Sawyer v. Butler*.

In *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), the Tenth Circuit Court of Appeals found harmless error in the submission of an invalid aggravating circumstance to a sentencing jury, concluding that the strength of the evidence supporting the valid aggravating factors showed convincingly that the sentencing authority would have sentenced the defendant to death even in the absence of the asserted error. This application of the harmless error rule is at odds with the decision below, where the Ninth Circuit found that "the due process violation had a pervasive effect on the composition of the trial record," App. 21, and that there was thus no way to determine how counsel might have made "countless tactical decisions" in the absence of the "error." If the Due Process Clause requires that counsel have the ability to control his presentation of facts at trial by measuring his tactical decisions against the knowledge that he will have to present evidence in mitigation, it must also require that he know, at the time of trial, what aggravating factors he must answer.

On the face of it, the occurrences of which the Ninth Circuit Court of Appeals complains should have been considered harmless. Taking account of the aggravated nature of the crime, it is difficult to imagine that Coleman's demeanor as a witness in his favor or the court's knowledge of his participation in prior noncapital offenses would have had any effect on the sentencing authority's judgment.

The court's concern for the prejudice Coleman possibly suffered because he testified and because his attorney cross-examined about his criminal record is founded almost wholly on an illusory view of what the sentencing proceeding might have been like in different circumstances. All of the information that came in at trial about Coleman's character, credibility and past criminal conduct could have been presented by the state at the sentencing hearing no matter what Coleman did. *See*, Mont. Code Ann. § 46-18-302. If Coleman's lawyer thought the trial strategy he pursued would help to gain an acquittal – as apparently he did – it is difficult to believe that he would have shunned this course as a means of avoiding sentencing evidence that legally could not be avoided. That Coleman's conviction should have been set aside for reasons such as these reveals a total lack of deference to state judgments.

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## CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Ninth Circuit Court of Appeals has defeated the good faith effort of the State of Montana to apply its capital sentencing law in accordance with federal constitutional requirements. The precedent created is not consistent with this Court's decisions and thus represents an unwarranted intrusion upon Montana's power to enforce its law.

Respectfully submitted,

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